

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Public Service Company of New Hampshire

Investigation of PSNH Installation of Scrubber Technology Station

Docket No. DE 08-103

**MOTION FOR PROTECTIVE ORDER AND CONFIDENTIAL TREATMENT
REGARDING JACOBS CONSULTANCY JUNE 2011 REPORT**

Public Service Company of New Hampshire (“PSNH” or the “Company”), in accordance with Puc 203.08, hereby moves the New Hampshire Public Utilities Commission (the “Commission”) to grant confidential treatment to certain portions of the June 2011 report of JACOBS Consultancy titled “New Hampshire Clean Air Project Due Diligence on Completed Portion” (the “JACOBS Report” or the “Report”) relating to PSNH’s Clean Air Project at Merrimack Power Station. In support of this motion, PSNH states as follows:

1. In January 2010, the New Hampshire Public Utilities Commission retained JACOBS Consultancy (“JACOBS”) to monitor the progress of PSNH’s Clean Air Project at Merrimack Station. Specifically, JACOBS was retained to conduct a due diligence review on the completed portion of PSNH’s Scrubber Project at Merrimack Station and to monitor the project through completion. On January 21, 2012, the Staff of the Commission filed the JACOBS Report in this docket. This report details JACOBS’ due diligence review of the Scrubber Project, including an assessment of PSNH’s Large Project Review Process, Cost Estimates, Project Schedule, Project Management Approach, Construction Approach and Safety. *See* JACOBS Report at 2-4.

2. PSNH submits this Motion for Protective Order and Confidential Treatment in order to protect from disclosure, in a manner described more fully below, the following three categories of information which constitute confidential, commercial, or financial information: (a) bid information, including the identity of bidders who participated in the Scrubber contracting process but were not selected as the winning bidder and final bid scores; (b) contract dollar amounts associated with each of the contracts, and; (c) information relating to the discovery submitted by JACOBS to the Company as part of its due diligence review which itself was the subject of a confidentiality agreement between PSNH and JACOBS. For the reasons set forth below, the Company believes that protective treatment is legally appropriate for each of these three categories of information.

3. RSA 91-A:5, IV exempts from public disclosure records that constitute confidential, commercial, or financial information. Based on *Lambert v. Belknap County Convention*, 157 N.H. 375 (2008), the Commission applies a three-step analysis to determine whether information should be protected from public disclosure. *See, e.g., Public Service Company of New Hampshire*, Docket No. DE 11-215, Order No. 25,313 at 11-12 (December 30, 2011). The first step is to determine if there is a privacy interest at stake that would be invaded by the disclosure. If such an interest is at stake, the second step is to determine if there is a public interest in disclosure. The Commission has held that disclosure that informs the public of the conduct and activities of its government is in the public interest; otherwise, public disclosure is not warranted. *Public Service Company of New Hampshire*, Docket No. DE 10-121, Order No. 25,167 at 3 (November 9, 2010). If both of these steps are met, the Commission balances those interests in order to weigh the importance of keeping the record public with the harm from disclosure of the material for which protection is requested. *Id.* at 3-4.

4. Based on the analysis below, the Company asserts that each of the three categories of information redacted from the JACOBS Report warrant protective treatment under this three-step review.

Bid Information

5. The JACOBS Report describes the contracting process utilized by the Company for the Scrubber Project, including the issuance of requests for proposals (“RFPs”) for certain of the services to be procured. Appendix 8.4 to the Report contains a listing of sixteen contracts associated with the Scrubber’s construction which were issued pursuant to RFPs¹. As part of its description of the bidding process, Appendix 8.4 identifies the names of the bidders to whom the RFP was issued, the name of the bidder that was selected, and in one case, the bid scores. The Company seeks protection of the names of the unsuccessful bidders for each of these contracts as well as the bid scores in order to honor its legal obligations to the bidders as well as to maintain the integrity of its procurement processes for any future solicitations in which the Company may engage.

6. Specifically, the RFPs which were provided to all bidders contained a confidentiality provision which states that “[b]idders are assured that any ‘Sensitive, Confidential or Proprietary’ information, ideas or protected design criteria submitted and identified as such, in Bidder’s Proposal will not be shared with their competitors.” Given the highly competitive nature of the marketplace for these vendors’ services, PSNH also entered into confidentiality

¹ These contracts included the following: (1) Scrubber Island: Siemens Environmental Systems & Services; (2) Material Handling : DMW; (3) Chimney: Hamon Custodis; (4) Wastewater Treatment System: Siemens Water Technologies; (5) Phase I Site Preparation: Cairns; (6) Booster Fans & Motors: FlaktWoods; (7) Phase II Site Preparation: Daniel O’Connell’s Sons Inc.; (8) Construction Services: CCB; (9) Concrete Foundation Installation: Francis Harvey & Sons; (10) Permanent FGD Substation: Eaton; (11) Balance of Plant Mechanical: AZCO; (12) Balance of Plant Electric: Boulos; (13) Ductwork Fabricator: Merrill Iron and Steel, Inc.; (14) Ductwork and Structural Steel Erector: Merrill Iron and Steel, Inc.; (15) Enhanced Primary Wastewater Treatment System: Siemens Water Technology, and; (16) Secondary Wastewater Treatment: Aquatech

agreements with vendors in association with their responses to the RFP. These confidentiality agreements assured PSNH that bidders would not release PSNH confidential information that was provided in order to prepare bids, as well as information submitted by bidders as part of their response to the RFP.² Specifically, this confidentiality agreement provided that “[c]onfidential Information shall not be used for any purpose other than to formulate a response to the RFP or to evaluate such a response.”

7. Here, both the Company and the unsuccessful bidders have a privacy interest in their identity and the scores of their bids. Bidders participated in the RFP process with the understanding that their response would be maintained in confidence. The Commission has repeatedly recognized this as a valid privacy interest, and withheld such information from public disclosure. *See e.g. Unitil Energy Systems, Inc.*, DE 11-028, Order 25,303 (December 15, 2011); *Granite State Electric Company*, Docket No. DE 11-016, Order No. 25,270 at 5 (September 12, 2011). The Company and bidders also have a privacy interest in bid scores. *See Unitil Energy Systems, Inc.*, Order 25,303 at 7-8 (protecting brief narrative discussion of bids received, a list of the suppliers who responded to the RFP, a pricing summary consisting of a comparison of all price bids, each bidder's final pricing, a summary of each bidder's financial security requirements of UES, a description of the financial security offered by each bidder, UES's ranking of each bidder's financial security, the contact list used by UES during the RFP process, and the Amendment to the master purchase power agreement with DTE). The bid scores reflect the Company's assessment of the bid, and if released in association with the bidders' identity, could have a chilling effect on the willingness of vendors to participate in the Company's contracting

² Confidential information was defined to include “either Party’s proprietary information of a business and/or technical nature that is owned or controlled by Disclosing Party.”

process in the future. *Id.* at 8.

8. Given these significant privacy interests, the Commission must next determine whether disclosure of that information would inform the public about the operation of the government. Here, disclosure of the identity of the unsuccessful bidders and the bid scores would not provide any information to the public on the workings of the government. The JACOBS Report examined in detail the integrity of the contracting process. Knowing the identity of those entities that were not selected and in the case of one contract, the scores of the two bidders (*see* page 67 of the JACOBS report) does not inform the public's understanding of how JACOBS conducted its work in evaluating the Company's contracting process in association with construction of the Scrubber. Because there is no public interest in disclosure, under the *Lambert* standard, the Commission's analysis concludes.

9. Even assuming that there is some slight public interest in disclosure of the bidders' identities and the bid scores, when balancing that interest against the Company's strong privacy interest, the Commission should find in favor of protection of the information. If unsuccessful bidders' names were to become public, it could impact the Company's ability to obtain robust participation in competitive solicitations in the future, regardless of the nature of the solicitation. This in turn could impact PSNH's ability to obtain competitive pricing, which ultimately would be to the detriment of the Company's customers. *Granite State Electric Company*, Docket No. DE 11-016, Order No. 25,270 ("As noted by National Grid, disclosing the information [responses to bid for default service supply] would likely impede its ability to engage suppliers in competitive bidding in the future, which would, in turn, make it more difficult to obtain its supply needs at competitive prices and might thereby increase rates to customers. Thus, there is a very strong privacy interest in avoiding disclosure, which we find is

not outweighed by the public's interest in disclosure.”).

10. Based on these reasons, the Company requests that the Commission issue a protective order prohibiting public disclosure of the unsuccessful bidders' identities, and condition any disclosure of that confidential information upon the execution of a mutually agreeable non-disclosure agreement.

Contract Price Information

11. Section 8.4 of the JACOBS Report also identifies the final contract amount (including a not-to-exceed amount) for each of the sixteen contracts identified above. The Company seeks protective treatment of that pricing information because it constitutes competitive, commercial, financial information which neither the Company nor the vendors have disclosed publicly, was submitted in confidence as part of the RFP process described above, and is subject to contractual obligations of confidentiality.

12. The Company's contracts with each of the vendors identified in the JACOBS Report include a confidentiality provision which prohibits the Company from disclosing the contractor's proprietary information for periods ranging from five to six years from the date of receipt of the proprietary information. For example, the Company's contract with Siemens Water Technologies for the Wastewater Treatment System provides that “[e]xcept as otherwise required to be disclosed by Owner for the development or financing of the Project, each Party agrees to hold in confidence for a period of six (6) years from the date of receipt, any confidential information supplied by the other Party and designated in writing as confidential by such other Party, *including this Agreement* (‘Confidential Information’).” (emphasis added). Thus, based on this provision, the contract document itself – which includes the pricing information contained in the JACOBS Report - is confidential and cannot be disclosed. Each of

the sixteen contracts contains an analogous provision which prohibits the Company from disclosing the vendor's proprietary information, which necessarily includes the contract price.

13. Further, the contracts contemplated the possibility that a governmental agency would request the information and provided a means for protective treatment of any confidential information sought. Again, by way of example, the Wastewater Treatment System contract with Siemens provides as follows:

If Owner [PSNH] is requested or required to disclose Contractor's Proprietary Information to any Governmental Authority or to comply with any Law, Owner shall, to the extent it does not violate or fail to comply with any such request or order, provide written notice to Contractor prior to disclosure and cooperate in any effort by Contractor to minimize the amount of Proprietary Information disclosed, secure confidential treatment of such Proprietary Information, or seek permission from such Governmental Authority to revise the Proprietary Information in a manner consistent with Contractor's interests, the interests of Owner, and in a manner that meets the requirements of the applicable Governmental Authority.

Consistent with this provision, the Company is in the process of notifying the sixteen contractors that the Company is seeking protective treatment of the contract prices in association with the Commission Staff's filing of the JACOBS Report.

14. Applying the three-step analysis described above, as the Commission must, the first inquiry is whether there is a privacy interest that would be implicated by the release of the information. The contract price information clearly constitutes confidential commercial information of the contractors. The contractors and the Company have a privacy interest in this information based on the express terms of the contracts. *See Granite State Electric Company*, Docket No. DE 11-016, Order No. 25,270 at 5. The contractors have a further privacy interest in the contract price stemming from their interest in maintaining a competitive position in the marketplace. In *New Hampshire Gas Corporation*, Docket No. DG 11-212, Order 25,281

(October 28, 2011), the Commission held that there was a privacy interest in the terms and conditions of a gas storage contract because if released,

potential lessors of gas storage facilities would be aware of the terms secured by NHGC for its storage needs if these terms were disclosed. Disclosure of these terms could cause competitive harm to the lessor serving NHGC, could discourage future counterparties of NHGC from entering into contracts for fear of such competitive harms, and could undermine NHGC's bargaining position for such contracts required in the future. Likewise, gas suppliers who may obtain NHGC's propane hedging information would be aware of the NHGC's gas supply costs, and the terms of its supply agreements. These suppliers may, then, be less likely to propose terms as beneficial as those in existence.

New Hampshire Gas Corporation, Docket No. DG 11-212, Order 25,281 at 8 (October 28, 2011); *see also Least Cost Integrated Resource Plan*, Docket No. DE 10-261, Order 25,234 at 3 (June 14, 2011)(finding that “the Company and its REC suppliers have a privacy interest in the [pricing] information because, for these types of market engagements, pricing terms (including offers) are key pieces of information on which much competition is based.”).

15. In this case, contractors have a privacy interest in the final contract price amounts given that they will want to continue to compete to provide services in the marketplace. The demand for installation of scrubber technology across the country is likely to increase dramatically given environmental compliance obligations facing coal-fired power plants. *See* <http://www.environmentalleader.com/2011/12/22/epa-issues-power-plant-mercury-rules>. If the individual contract pricing information from this scrubber project is released publicly, it could inhibit the ability of each contractor to compete in future solicitations for the installation of scrubber technology at other power plants. For example, if a competitor for the construction of a scrubber island knew the price received by Siemens Environmental Systems & Services by PSNH, Siemens' competitors could gain an advantage in pricing their bids on other scrubber projects in the future, which would be extremely detrimental to Siemens in any future contract

solicitation process. This alone constitutes a compelling privacy interest that warrants protection.

16. Given both PSNH's and its contractors' significant privacy interests in the pricing information, the Commission must then consider whether there is a public interest in disclosure of the information. The Commission has held that disclosure that informs the public of the conduct and activities of its government is in the public interest; otherwise, public disclosure is not warranted. *Public Service Company of New Hampshire*, Docket No. DE 10-121, Order No. 25,167 at 3 (November 9, 2010). Section 8.4 of the JACOBS Report merely states the contract prices. The pricing information alone does not provide the public with insight into JACOBS' work but rather is a mere restatement of what is in each of the contracts. Thus, there is no public interest in disclosure of this information because its disclosure would not reveal anything about JACOBS' work, other than it correctly copied the prices from each of the sixteen contracts.

17. If the Commission were to find that there is some public interest in disclosing the information, the Commission must then balance that interest against the contractors' and Company's privacy interests. Here, there is significant potential harm from release of the contract price information. As indicated above, the demand for scrubbers is expected to be significant in the coming years and it is reasonable to expect that the contractors that constructed PSNH's Scrubber would want to bid on other scrubber installations in the future. These contractors should not be disadvantaged in their ability to compete for this future work by disclosure of their pricing information here. *New Hampshire Gas Corporation*, Order 25,281 at 8; *see also Electric and Gas Utilities* Docket No. DE 10-188, Order 25,189 (December 30, 2010) at 20 (granting protective treatment to labor and materials pricing and other commercially sensitive contract terms for energy efficiency services provided by utility subcontractor because

the “harm of public disclosure of the competitive energy efficiency labor and materials pricing and commercially sensitive contract terms outweighs the benefits of disclosure”); *Least Cost Integrated Resource Plan*, Order 25,234 at 3 (“The disclosure of this information may place the Company and its REC suppliers at a disadvantage with respect to those with whom they would do business in the future, and could ultimately increase costs to ratepayers”). If contract pricing information were released, New Hampshire could become viewed as a state in which it is unfavorable to work for utilities.

18. For these reasons, the balancing tips significantly in favor of protection of the pricing information and a protective order should issue accordingly. Further, while the Company does not object to disclosure of the pricing information to Staff and the Office of Consumer Advocate, the Company requests that any protective order provide that this information only be disclosed upon execution of a mutually agreeable non-disclosure agreement. The Company further requests that if the information is sought by any entity or individual that owns, has a member who owns, or any affiliate who owns coal-fired generation plants, that such information only be disclosed on an attorneys ‘eyes only basis. This limitation is necessary given that it is possible that such coal-fired generation plants may install scrubber technology in the future, and such plants should not gain an advantage on the pricing of such technology by virtue of their participation in this case.

JACOBS Data Requests

19. To conduct its review, JACOBS sought information from the Company about the Scrubber in the form of data requests, the text of which are set forth in Appendix 8.1 and identified in various footnotes throughout the Report. As the JACOBS Report acknowledges, the process to obtain information for this review was affected by pending litigation. JACOBS Report at 2. Given that context, the Company and JACOBS negotiated a Confidentiality Agreement to govern JACOBS access to and use of the Company's confidential information. A copy of that agreement is attached to this Motion.

20. The Confidentiality Agreement expressly referenced the unique context in which the information was being provided, acknowledging that "PSNH's construction of the FGD System, despite the legislative mandate to install this specific technology at Merrimack Station, is currently the subject of litigation and threats of litigation by various parties and thereby subject to heightened and extraordinary scrutiny." The Company seeks to withhold from disclosure from any party to this proceeding the identification of the data requests in light of the provisions of the confidentiality agreement.

21. As described in Confidentiality Agreement, JACOBS agreed that confidential information provided to it would be "held in trust and confidence by Jacobs and shall not be used for any purpose other than managing and completing the scope of work Jacobs has agreed to perform..." Section 3, Confidentiality Agreement. The Agreement expressly contemplated whether information could be released to the Commission Staff, and created limitations on the provision of underlying documents to the Staff in certain circumstances. *Id.* at Section 4. The parties further agreed that the Company's provision of confidential information to JACOBS "shall not be construed as a waiver of any rights PSNH may have in regard to maintaining the

confidentiality of these documents.” *Id.* at Section 1. The Company sought and obtained these provisions from JACOBS as part of the ground rules for the due diligence review because it was concerned not only about meeting its confidentiality obligations with third parties but also maintaining the confidence of the Company’s own documents that it had not otherwise disclosed. The Company provided extensive documentation to JACOBS based on this understanding.

22. Through this motion, the Company seeks to protect its legitimate privacy interest in the discovery process associated with the due diligence review. Appendix 8.1 of the JACOBS Report contains an extensive listing of documents produced to JACOBS and includes among the list confidential documents. The Company has a legitimate privacy interest in the identification of that information. As described above, the Commission has a long precedent of finding a privacy interest where parties provide information based on the understanding that information will be maintained in confidence. *See infra* p. 4. Given the existence of that interest, the Commission must then consider whether release of that information would reveal the workings of the government and thus be in the public interest. The JACOBS Report informs the public that it reviewed over 3,000 pages of documents as part of its analysis, and adequately identifies the subject matter areas of its inquiry based on the content of the report itself. In order for the public to have insight into JACOBS’ work, however, it is not necessary to know the identity of every document provided to JACOBS.

23. Even if the Commission were to conclude that there was some public interest that would be promoted through disclosure of the information, that interest is outweighed by the harm that would occur to the Company’s privacy interest. The Company negotiated and entered into the Confidentiality Agreement in good faith. To require the public release of information that the Company understood would be treated confidentially would create an untenable

precedent where regulated entities could never be certain whether a contractual obligation of confidentiality would be respected. This certainly would not be in the public interest. Moreover, to the extent participants in this docket have questions about the JACOBS Report, the Commission can determine an appropriate process for inquiry and comment on the Report. Releasing the list of discovery questions submitted to the Company does not achieve that end. For these reasons, the Company requests that the Commission withhold from release to any party the information contained in Appendix 8.1 and the related footnotes describing data requests in the JACOBS Report.

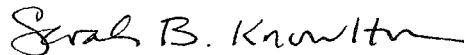
WHEREFORE, PSNH respectfully requests that the Commission:

- A. Grant this Motion for Protective Order and Confidential Treatment; and
- B. Grant such other relief as is just and equitable.

Respectfully submitted,

Public Service Company of New Hampshire

By Its Attorneys



Dated: January 20, 2012

By: _____

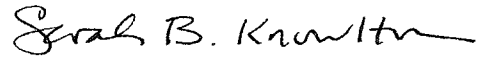
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Certificate of Service

I hereby certify that a copy of this Motion for Protective Treatment and Confidential Treatment has been served electronically on the persons on the Commission's service list in this docket in accordance with Puc 203.11 this 20th day of January, 2012.



Sarah B. Knowlton